Decision #93-040

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1990, c. H. 19, as amended, and

IN THE MATTER OF THE COMPLAINT OF

HALIA (HALYNA) KOBA

against

BRAVE BEAVER PRESS WORKS (TURBOPRESS) AND JOHN J. DUNLOP,

dated November 20, 1986,

ALLEGING DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF SEX
PURSUANT TO SECTIONS 4 [NOW 5](1), 6 [NOW 7](2 AND 3), AND 8 [NOW 9].

The above matter was heard on the following dates by a Board of Inquiry, appointed by the Minister of Citizenship on October 19, 1992:

November 18, 1992 (teleconference); January 22, 1993 (hearing on motion to dismiss on account of delay); January 29, February 25 (teleconferences); June 2 and 3 (hearings on the merits of the complaint). Transcripts received July 2.

Date of decision: July 19. Place of hearings: Toronto.

By agreement, Turbopress Inc., as the successor to Brave Beaver Press Works, was entered as a respondent.

Board of Inquiry: W. Gunther Plaut.

Appearances:

Mark Hart, for the Ontario Human Rights Commission;

Deirdre Newman, for the Complainant;

Paul Pape and Pauline Bosman, for the Respondents

DECISION

The Issue of Delay.

Ms. Halyna (also known as Halia) Koba filed her complaint on November 20, 1986, so that a full six years elapsed before the matter was heard by this Board.

Counsel for the Respondents moved for dismissal on the grounds of excessive delay, claiming that in view of the unavailability of witnesses deemed essential to Respondents the latter were severely prejudiced and incapable of mounting a full defense. Several witnesses, counsel averred, could not be found or had moved away.

Subsequently, staff of the Ontario Human Rights Commission ("Commission") managed to ascertain the whereabouts of all such witnesses, with the exception of one that was traveling somewhere on the high seas.

Another witness deemed essential for defense against the claim was living in another province, but Respondents declined to assume the costs for bringing her to Toronto, seeing that the delay had been entirely the fault of the Commission. Since this claim was not contested, the Board issued an Interim Decision (dated February 1, 1993, attached hereto as Appendix A), asking the Commission to make all arrangements for the transportation of said witness and to assume, for the time being, all costs arising therefrom.

In view of the possible availability of the witnesses, save one, the Board reserved on the motion to dismiss.

A further delay was occasioned when Mr. Dunlop's father passed away and the Board agreed to a request for adjournment (Interim Decision, dated February 22, 1993, attached hereto as Appendix B).

Another development was revealed when the hearings began on June 2. Witness Nanette Jacques, who is living in Alberta, indicated that contrary to her earlier statement she was unwilling to appear. Counsel for the Respondents reiterated the motion for dismissal of the complaint on the

grounds of prejudice to their clients. The Board proceeded with the hearings undertaking to rule on the motion in his final decision.

The parties agreed, *inter alia*, to admit written certain items into the record, such as notes taken by an officer of the Commission and counsel for the Respondents, regarding their interviews with women who worked for Beaver Press (Exhibits 10-12). They portray Mr. Dunlop as a serious person and attentive to business, and voiced the opinion that the allegations were incongruous. Ms. Jacques termed them ridiculous and said that Mr. Dunlop was not given to jokes and that she had traveled with him to trade shows, that nothing untoward had ever happened. Ms. Jameson commented:

> John Dunlop in my experience is not the kind of guy who would do these sort of things." (Transcript - hereafter "T" - 1:33)

It was understood that this material, though favourable to the Respondent, should not be deemed to be of equal value with live testimony, which was not available.

The hearings, established beyond a doubt that the delay of six years was overwhelmingly due to the Commission -- apparently because its staff could not handle the volume of work required. The only delay that could be charged to Respondents was an adjournment of about three months, due to the death of Mr. Dunlop's father, which occurred after the hearings had begun.

A delay of six years appears to this Board as inordinate, and raises the question whether it constitutes an abuse of process or, failing that, whether Respondents have been prejudiced by the delay.

A fair number of judgments both by the courts and by boards of inquiry have dealt with the matter of delay; see, e.g., *Walter Hyman v. Southam Murray Printing and International Brotherhood of Teamsters, Local 419* (1982), 3 C.H.R.R. D/617; *D'Amore Construction (Windsor) Ltd. v. Ontario* (1991), 7 O.R. (3rd) 762; *Latif v. Ontario Human Rights Commission* (1992), unreported; *Aquil Lasani v. Ministry of Community and Social Services and L.E. Strang and Susan Goodman* (1992), unreported; and the analysis by Prof

Dawson in *Hall (Trottier) v. A-1 Collision and Auto Service et al.* (August 28, 192), unreported, Ont. Bd. Inq., at 38-43).

In sum, they have ruled that, though significant or even gross delay is regrettable, the case can go forward unless prejudice or abuse of process can be shown. What criteria are to be used in determining whether prejudice or abuse o process have occurred? The test most commonly referred to is found in *Hyman* (at D/5969): dismissal of the complaint is justified

1) if delay gives rise to a new situation where facts cannot be established with sufficient certainty to determine contravention of the *Code*;

2) if passage of time has made it impossible to ascertain the relevant facts.

These prerequisites do not seem to be present in the instant case. The absent witnesses may indeed attest to the good character of Mr. Dunlop, and Ms. Jacques and Ms. Jameson have certainly done so, as attested by the notes admitted to the record. But the value of these attestations is limited as all similar fact evidence is, for it does not and cannot address the core of the question, namely, whether Mr. Dunlop made sexual advances to the Complainant.

It is in the nature of harassment complaints that they usually occur away from the eyes of witnesses, and that therefore claim and counter-claim must be adjudged by inference and assumption. Mr. Dunlop and Ms. Koba are the only ones who know what took place, and this Board must decide on the balance of probabilities who is right and who is wrong. This represents a configuration with which the public has lately become thoroughly familiar through the wide publicity accorded the U.S. Senate confirmation hearings of Judge (now Justice) Clarence Thomas and the claims of sexual harassment made by Professor Anita Hill.

Considering the circumstances of the instant case I have concluded that Respondents are not prejudiced by the physical absence of Ms. Jacques and Ms. Jameson. I take the notes of the conversations with them as supporting the assessment of Mr. Dunlop as being, in the writers' view, a person of good character. This fits well with the fact that no evidence has been brought

forward that would show otherwise, and no other incident of sexua' harassment has been laid at the Respondent's door.

Nor can prejudice to Respondents be claimed because of the passage of time. None of the witnesses has claimed loss of memory because more than six years had passed.

Therefore, whether or not Mr. Dunlop sexually harassed the Complainant must be decided on the basis of other evidence and, in the end, comes down to the credibility of the two main contestants.

In view of all of these circumstances I have decided not to dismiss but to let the case go forward and rule on it on the basis of merit, especially since this is the only way by which the Complainant can have her case heard. This does not mean, however, that the delay caused by the Commission has gone unnoticed or that it is without consequences. I shall return to this matter in the last part of this Decision. At this point, therefore, I will proceed to evaluate the evidence.

The Allegations.

The essentials of the complaint are the following:

In early September of 1986 Ms. Koba, a journalist, sought work from Mr. Dunlop, then editor/publisher for various publications sponsored by Brave Beaver Press Works (now Turbopress. Among the publications were *Motivational Marketing* and *Motorcycle Dealer and Trade*.. Some weeks later Mr. Dunlop offered her a two-days-a-week arrangement which would involve contacting industry, re-writing, editing and proof reading. The rate would be 15 cents per word.

This offer was supplemented on October 16 through a call he placed to the complainant at 9:00 PM, in which he asked her to do an article on an emergency basis, at the rate of $ 100 a day. When she commented that the pay was very low he lowered his voice (so she testified) and said "I'll make it up to you later." (T 1:57)

The tone made her wonder whether his remark meant more than the words by themselves conveyed, and made her feel uneasy. He, in turn, testified that they meant nothing more than what everyone would understand them to mean, namely, that he could not presently pay more, seeing that the financial situation of the business was precarious, and that he hoped that later on he would be a in a position to pay more. He had no recollection of having lowered his voice to say this; it was nothing more than a simple statement of fact: "I can't pay more at this time, but later on I hope I'll be able to."

The next morning she met him in his office where, Ms. Koba said, he asked her to sit closer to him than in the chair she had already chosen, and that when their conversation came to an end he leaned over and brushed her hair off her face in a quick motion. Then he helped her on with her coat and in doing so stood uncomfortably close behind her. Mr. Dunlop denied brushing her cheek, but admitted that he had a habit of standing close to people and that, if he had touched her hair it would have happened while helping her with her coat (see *infra*).

Ms. Koba was upset and on leaving the office took a long walk. She had never had this kind of business contact before. (T 1: 60, 139)

Upon arriving home she found a message from him on her answering machine, asking that she call him. When they did talk she again complained about the low pay offered and he again lowered his voice and said that he would make it up to her later. In view of what had happened at the office she began to feel increasingly uncomfortable, for there was the same innuendo in his voice that she had thought she had heard before. Mr. Dunlop denied any innuendo, saying that it meant there wasn't enough money at the present time to pay more. A witness, Ms. Coldman confirmed that Mr. Dunlop used this expression for that purpose. (T 2:105)

He called again that afternoon and this time said at once: "We've got to stop meeting like this. Next time we'll have to take off our clothes and make it interesting." She was shocked and could hardly believe what she had heard, which incongruously was followed by an ordinary piece of business information. He informed her that her task had been changed to a "sidebar"

article (a supportive piece), since the person originally assigned to write the feature had reappeared and was doing it after all.

Mr. Dunlop could not recall having made the offensive remark about taking off their clothes, and later -- after Ms. Fox testified that he occasionally used that expression -- admitted to its use on other occasions.

> Q. So you are saying it's possible that you may have said this to Ms. Koba; it is likely that you said this to Ms. Koba?
>
> A. No. (T 2:54).

But on cross-examination he amended his answer:

> Q. Her evidence is that you did make that comment to her on the phone. Is you evidence today that you definitely did not make that comment?
>
> A. No, that is not my evidence. I am saying I may have...I do not remember saying it. (2:83-84)

Ms. Koba testified that she had not responded and felt growing uneasiness about the developing scenario. (T 1:61). She planned to go to the office on October 20 to tell him so and to ask him for a letter confirming her duties and pay. She sat wrote a memo of what had happened, (Exhibit 5)

She was asleep when the telephone rang at 1:30 AM on the 20th, and heard Mr. Dunlop say to her that he couldn't sleep and wanted to talk to her. She responded:

> "Well, I think we should be speaking in the office tomorrow morning", and of course I meant Monday. He kept on insisting that he couldn't sleep, he wanted to talk to me. I started to hang up, he said, "Don't hang up." He really wanted to-talk to me, he couldn't sleep.
>
> So I interrupted him and said, "Really. let's speak in the office on Monday." And then he said, "Just answer me one question. And I said, "Well, what?" And he said, "What clothing are you wearing?"

> Well, I immediately hung up. I was shocked. I would say I was more than shocked; I was quite emotionally wrought up. I had been woken up from a deep sleep. It was a rude awakening. It's kind of hard to think rationally at that stage. But I tried to resolve it in my mind and I was quite horrified. (T 1:65)

Her distress was deepened when she realized that her caller had her address, and that -- because of a defective lock on the front door -- her apartment was accessible. She thereupon called the police.

Mr. Dunlop categorically denied that he had called that night.

> Q. In terms of the phone call at 1:30 in the morning, your evidence, I take it, is clear and unequivocal you never made that phone call; is that right?
>
> A. That's correct. (T 2:85)

The officers came forthwith and one of them, Jim Makris, testified that inasmuch as Mr. Dunlop's call was only a single incident, no occurrence report was filed, meaning no further action was indicated under existing police guide lines. The officer recorded nothing about her being afraid and testified that, had she mentioned it, he would have recorded it. (T 1:179)

After the police left Ms. Koba, deeply upset, switched on her answering machine and went to bed.

When she finally fell asleep and had slept three hours, Mr. Dunlop called her again, at 9:10 o'clock, waking her. The conversation is recorded and has been introduced as Exhibit 6B. It bears out Ms. Koba's claim that two successive calls were made by the Respondent. They said:

> Halia, this is John Dunlop, at *Motivational Marketing*. I am calling to suggest that you set aside tomorrow morning to come in and work on the business gift re-write with me. That frees you up for today for whatever other plans you had. (T 1:69-70)

He could not remember why he made this suggestion, perhaps something had come up. (T 2:89; there was considerable discussion about the meaning

of the call being interrupted and then placed again, and this as well as hi' tone was supposed to show hesitation on his part. I have considered this as speculative.)

Ms. Koba visited a legal aid clinic, where she was advised to file a charge with the Commission, which she proceeded to do and initiated the complaint process. She also asked that the clinic contact Mr. Dunlop advising him that she would not welcome future contact. The clinic informed her later that they had called him. (T 1:72-73)

The next day she felt a severe pain in her shoulder and went to see Dr. Hellman at Queensway Hospital [now St. Joseph Health Centre], who said that her pain could be stress related and prescribed Tylenol with codeine, and also valium. (The pharmacy gave her a generic equivalent to valium.) She went home, took the medicines, and thereafter slept on and off for four days.

On October 27 she again visited a doctor -- the pain persisting and making it difficult for her even to wash the dishes. This time she saw Dr. Reece at the Women's College Hospital, who prescribed a different medicine for her shoulder pain see Exhibit 7). After two weeks she began to feel better, but was depressed and not functioning well for the next two weeks a and canceled all previously made appointments. (T 1:80)

At that time she had an assignment from *Ontario Restaurant News;* she did answer some advertisements but did everything without her usual confidence -- a dysfunction that would last until the following summer. (T 1: 105-108)

Eventually she was again able to take up her profession and, being an honours graduate in journalism, succeeded in establishing herself. She currently serves, *inter alia*, a large number of governmental agencies. (Exhibit 7)

The issue of credibility

Like most cases in which sexual harassment is the main issue, the credibility of the alleged harasser and alleged harassed person is the heart of the board's decision. This is the case also in the matter before me, for there is no reason to doubt the credibility of any of the other witnesses that appeared at the hearings.

a. The credibility of Mr. Dunlop.

Mr. Dunlop was given a high rating by all his former employees who were heard or contacted. They described him as a man of probity and found it unlikely that he would have done what Ms. Koba alleges.

To be sure, there was often loose or raunchy talk at sales meetings, but that was a matter of give-and-take, and not only Mr. Dunlop was given to such language. But the midnight call was deemed another matter, and Mr. Dunlop denied that he had made it. No one else was there to hear it except the Complainant, so that the credibility of one over and against the credibility of the other is the issue.

On the stand, Mr. Dunlop was collected, gave clear and unambiguous answers. He was animated and exhibited something of the energy which he had expended while juggling many responsibilities for his company. He denied vigorously that he had made the contested call and equally denied Ms. Koba's account that he had brushed her face and hair while she was sitting at his desk. His demeanour conveyed the impression of a man who believed he had acted professionally and with all due respect to the Complainant. If he had called her "Love" at any time he explained -- believably -- that it was a Liverpudlian "Luv" without any meaning. (T 2:84) When he testified the matters at issue did not appear to elicit any particular emotion except a strong denial of wrong doing.

Counsel for the Commission attacked the credibility of Mr. Dunlop in a number of ways. He pictured his actions as a succession of sexual approaches which followed each other and increased in their suggested content. According to this, the escalation went as follows:

1. Lowered voice, saying, "I'll make it up to you later." Any sexual implication was denied by Respondent. Rather, the remark fit the context, for *Motivational Marketing* was a new journal with limited financial means

2. Brushing the hair off her face. Denied altogether by Respondent.

3. Standing close behind her while helping her on with her coat. While Mr. Dunlop denied any wrongful implication he himself testified that Ms. Jacques had warned him repeatedly of his habit of standing too close to others. (T 2:17-18) He suggested that Ms. Koba's interpretation was probably a recall of one and the same act: in helping her on with her coat he may have lifted her long hair so that it would not interfere with the collar on her coat. Ms. Koba rejected this explanation since her overcoat did not have a collar and her hair was never long. When asked in cross-examination how she could remember what kind of coat she was wearing six years ago, she answered that it was the only coat she wore that fall.

4. The telephone call made to her home in the evening was experienced as disconcerting by Ms. Koba because of the late hour, but considered routine business procedure by Respondent and other testimony.

Upon her complaint that the proffered pay was too low, Mr. Dunlop again said: "I'll make it up to you later." Any sexual implication was denied by him, and also by witness Jacqueline Coldman who testified that he had a habit of using this expression. (T 2:105)

5. The next phone call started directly with the words: "Next time we'll have to take our clothes off..." Respondent could not recall having said this to her, though testimony showed that at sales meetings he had used this expression. In any case, he proceeded at once to a discussion of business and not of sex.

The testimony of a former employee, Ms. Angela Fox, which conveyed a favorable impression of the Respondent, showed the following: The office was awash with crude remarks. "We were in the motorcycle business," she commented, "and not in a nunnery." When asked about the expression, "Let's take our clothes off" (above, #5), she remarked that indeed Mr. Dunlop had

been saying this on occasion, but it meant nothing and, like other such expressions, was "like water rolling off the duck's back." (T 1: 182/3, 190)

This alleged incident (to which I will return *infra*) demonstrates much of the contrasting nature of the testimony of the two main *personae*: Ms. Koba experienced what he said in one way, and he in another. Mr. Dunlop, in fact, called the whole affair "a total misunderstanding." (T 2:60)

6. The call in early morning with the question, "What are you wearing?" was categorically denied by the Respondent. There is no external proof that he did make the call (such as the later messages recorded on tape), and therefore any judgment regarding this crucial incident is totally dependent on who is to be believed, he or she.

The end of this alleged escalation of sexual approaches by Mr. Dunlop has already been discussed: Ms. Koba was so upset that she called the police. She had no further contact with Mr. Dunlop's office, consulted doctors about her neck pain and experienced emotional inability to function for some time..

b. The credibility of Ms. Koba.

The Complainant did not introduce character witnesses there was no one to attest to her veracity or any other matter that might throw a favourable light on her personality or on the way she conducted her personal and business life. Apparently she and her counsel believed that she, by herself and the way she related her story would stand the scrutiny of a board of inquiry.

In contrast to Mr. Dunlop, Ms. Koba gave every indication that she was deeply affected by the recollection of events about which she testified. Her lips quivered with feeling, but when she was challenged in cross-examination and pressed hard by counsel she showed that despite her visible emotion she was fully in control of herself and gave convincing and forceful replies. I saw her as a woman recalling moments of considerable anxiety and not, as Respondent counsel suggested, as one who lived in a world of overwrought imagination.

But that alone would not have been sufficient to find the Responden guilty of infringing the Code. Some external, objective evidence was required for such a conclusion and to convince the Board without a doubt that her story was to believed -- despite the character testimony rendered in behalf of Mr. Dunlop.

Such evidence does indeed exist, though it was not alluded to by counsel for either the Commission or the Complainant. But the record reveals it clearly of itself, and in three respects.

In order to make this point it is well to rehearse three of the five points which the Commission enumerated as stages in the escalation of Mr. Dunlop's dealings with Ms. Koba.

1) There is the expression, "I'll make it up to you later" (#1). Mr. Dunlop does not deny saying it and witnesses agree that he would use this phrase if the occasion warranted it

2) She complained that while helping her with her coat he stood uncomfortably close to her (#3). He admitted that this was his habit, whicl. he tried to break.

3) "Next time we'll have to take our clothes off..." (#5). Mr. Dunlop was equivocal about having said this to Ms. Koba, at first denying it and then qualifying his answer. But Ms. Fox testified that she had heard him say this at a sales meeting.

But how do these points prove Ms. Koba's credibility? They do, in a forceful and incontrovertible way.

For the Complainant had never worked in the office nor had she attended a sales meeting (T 2:82) at which she could have heard Mr. Dunlop say "I'll make it up to you later", nor did she know of his tendency to stand too close to people.

Above all, she could not possibly have known that Mr. Dunlop would speak to the staff of "taking off their clothes", using that expression as a lighthearted quip, which those present would understand. In the presen

inquiry about Ms. Koba's credibility this recollection of hers has crucial insignificance. Since she could not possibly have invented this remark, nor points #1 and 3, I am led to believe that she did not invent the crucial 1:30 AM call either; that it was in fact made by Mr. Dunlop; and that she telephoned the police because of it and not because she had experienced a nightmare.

The above-noted tape from Ms. Koba's answering machine records two messages, both from Mr. Dunlop and they support that conclusion. The first was placed at 9:10 AM on October 20, that is., on the morning after the 1:30 AM call. He asked her to come in the next day and to have her call him back. "I'm freeing you up for the day," he said. Why? When asked, Mr. Dunlop could not explain and suggested that perhaps he was tired.

The second call came that same night, at 8:10 PM, again asking her to call back. There was no explanation why he should have phoned again. Without a cogent explanation, this call (which turned out to be their last contact) underscores the intrusive nature of the Respondent's behaviour. To have made the emergency call was understandable and legitimate, to invade the privacy of Ms. Koba's home on additional occasions was quite another matter. The Complainant's concern about this kind of business relation is not surprising.

While Mr. Dunlop himself could find no reason for the taped messages on October 20, it seems to me that, realizing that he had committed an error by placing the past-midnight call, he now tried to get things back to normal. They support Ms. Koba's assertion that indeed he had made the midnight call.

Were the remarks, actions, and telephone calls made by Respondent a succession of ever more suggestive innuendoes, as Commission counsel avers? I doubt that Mr. Dunlop planned such a finely honed strategy of escalation. However, even Ms. Fox, a witness who testified to the probity of his character, said that the 1:30 AM remark which the Complainant reported, would not be acceptable and could not be compared to the usual office banter and its crudities.

His 1:30 AM call fits in with one other piece of evidence. Mr. Dunlop was so involved in his business activities that they interfered with his marriage, and in fact he separated from his wife during the ensuing winter months. (Evidence of Ms. Coldman, T: 2:101). It is not unlikely that his ongoing marital problems caused him to phone Ms. Koba repeatedly and do so even at an unorthodox hour. Since Mr. Dunlop denied making the call altogether this matter could not be pursued, nor could it be established under what circumstances the call was placed.

Respondent counsel attempted to discredit Ms. Koba's veracity by citing two important incidents. He called then "fatal" to her case.

One was the police record. It said nothing about the defective front door lock, and the police did nor consider the incident worthy of further attention. I have already dealt with the first observation (see *supra)*, and as for the second, I was sympathetic to Ms. Koba's testimony that the police "laughed the matter off," though she emphasized that they were courteous enough, although the officer said that the police took every call seriously.

I find it believable that she was led to call them because the front door lock to her rental accommodation was indeed defective, and access to her apartment thereby made easy. To be sure, she apparently did not mention this to the police (or at least the officer did not record it), but a person in a high state of anxiety cannot be judged *ex post facto* like on who deliberately chooses her words. Her emphasis was on what Mr. Dunlop had said, and the police officer entered this in his book.

I do not put Officer Makris's testimony in question, but at he same time I believe that police officers, much pressed with violent incidents, found Ms. Koba's midnight experience to be less that noteworthy and not requiring an occurrence report. The woman was worried that something might happen, but to the police there was little likelihood of it, the caller having given his name, and in this respect they were right: nothing did happen subsequently.

But while the police's evaluation is understandable I am not bound by their routine.. Some could see the call to the police as an overreaction by Ms. Koba, but others would consider it the understandable reaction of a woman

who felt cornered in a world where men could pursue their prey at night or at any time, without interference. The police were most likely acting in accordance with established procedures, which provided no reassurance for Ms. Koba. She had experienced sexual harassment before, and she was frightened. She had been harassed twice before. (T 1:165)

Would another woman have acted otherwise? Possibly, but the instant case deals with Ms. Koba. She felt threatened and harassed, and this Board believes she had a right to feel that way.

Counsel's second attempt to discredit Ms. Koba arises from her visit to Dr. S. E. Reece. whom Ms. Koba visited one week after the police had been called. (Exhibit 7) Dr. Reece's letter, to be sure, says nothing about the Complainant being under stress, and Respondent counsel takes this as proof that there was no stress, because there was no harassment from Mr. Dunlop.

However, it is noteworthy that the report was composed nine and a half months after the visit, in order to verify Ms. Koba having sought Dr. Reece's medical help. The physician herself had seen Ms. Koba as an outpatient in a hospital and did not know her nor have they had any recorded contact since. The letter merely records what was necessary: such and such a medication was prescribed for such and such a complaint (in this case Ansaid and Tylenol. (T 1:79). I do not consider the absence of any reference to her mental state as significant, especially since Ms. Koba avers that she did tell her about it. (T 1:98) Outpatients at large hospitals such as Women's College Hospital in Toronto cannot be compared to patients who are known to their own physicians and talk to them in the privacy of their office. An outpatient clinic is totally anonymous in its approach; in the rapid succession of people seem one is like the next, and no personal contact ensues in most instances. The doctor makes the minimum necessary notation and goes on to see the next person. Her letter does not, in my view, destroy Ms. Koba's credibility.

Finally on must ask why she did not visit a therapist of some kind to treat her depression and inability to function professionally. The matter was not pursued, though Respondent counsel suggested that she had no reason to visit a therapist, because she did not need to do so.

I have not drawn that conclusion. Instead, I see Ms. Koba as a very private person, who had been harassed on two previous occasions, and who did not wish to face further exposure. This was her choice and is quite understandable in terms of her personality and cannot be used to prove that the alleged incidents did not occur. (It does, however, impact upon the award, as will be discussed *infra)*

Legal Issues.

Since this Board concludes that the balance of probabilities tilts towards Ms. Koba's account, the question arises whether Mr. Dunlop's conduct constituted a breach of the *Human Rights Code* ("the *Code*").

Ms. Koba's complaint is based on the following sections of the *Code* (cited as they appear in the current, amended version):

> 5.-(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin , citizenship, creed, **sex,** sexual orientation, age, record of offences, marital status, family status or handicap. [Emphasis added.]
>
> 7.-(2) Every person who is an employee has the right to freedom from harassment in the workplace because of sex by his or her employer or by another employee.
>
> (3) Every person has a right to be free from
>
> (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome...
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Re 5(1).Ms. Koba was exposed to the treatment she received because she was a woman, and hence the section applies.

Re 7(2). Ms. Koba had become a part-time employee of the Respondent company, was given assignments at a certain pay scale. No written contract had been issued, but it is not contested that Complainant had begun her work in at least one respect and was willing and ready to do the rest. Hence, s. 7(2) clearly applies.

By his actions Mr. Dunlop personally infringed the *Code* and also involved his company. He was an editor/publisher of the corporate employer, he is -- in human rights precedent -- deemed a "directing mind" of the company, which makes the latter culpable.

Re 7(3)(a). Did Mr. Dunlop know, or should he have known, that his advances were unwelcome? This matter was not explored at the hearings, principally because he denied that he had made the damaging solicitation. However, the denial implies, so it appears to me, that he himself would consider such an action improper. Ms. Koba was not an old acquaintance who, he might hope, would go along with such advances; she was in effect a stranger whom he had met on only a few brief occasions.

Can the entire behaviour of Mr. Dunlop (save the past-midnight call) be explained by the fact that there was a generally accepted "motorcycle environment" at the office? Expressions were bandied about by everyone that would not be tolerated in other businesses -- such as addressing women as "Love" or saying to them, "Let's take our clothes off to make it more interesting."

Seen from the point of the Respondent, such talk might indeed appear as innocent banter, but the matter must also be seen from the point of view of Ms. Koba. There is no indication that she was warned to expect rough talk as an everyday occurrence and, had this been done, she might have decided that this environment was not for her. As it was, she was engaged in a straightforward, ordinary and accepted fashion to do journalistic work, and it is no surprise that she was shocked at the side effects this entailed. The crucial 1:30 AM call made her expect the worst and she called the police. She was injured and therefore is due compensation.

Award.

Counsel for the Complainant asked for special and general damages. Both are based on s. 41(1)(b) of the *Code*, which empowers the Board to award special damages by directing

> the party to make restitution, including monetary compensation, for loss arising out of the infringement...

It goes on to state that up to $ 10,000 may be awarded [in general damages] for mental anguish if the infringement was done willfully or recklessly.

Requested special damages.

Commission counsel seeks

1. compensation for the sidebar article which was commissioned, at 15 cents/word, amounting for an average article of 700 words to $ 105.

2. compensation for 32 weeks during which, it is suggested, Ms. Kobz would have continued to work for Beaver Press at $ 10/day twice a week, which would amount to $ 6,400;

3. Loss of opportunities for work outside the 2 days/week, estimated at $ 5,000.

Requested general damages.

They arise from Mr. Dunlop engaging "willfully" in his conduct. Counsel called the hitherto modest awards in such instances "an insult to women," and furthermore took the $ 10,000 limitation of the *Code* to be one of administrative restraint rather than a reflection of the "worth" of the (unquantifiable) injury. A board might well decide that the award should be, say, $15,000, but in view of the *Code's* limitations would be reduced to $10,000. This procedure would raise the awards for mental anguish significantly. (The precedent referred to is *Gosh v. Donglass et al.*, Ont. Bd. Inq., decision 5 June 1992, unreported.) . Consequently, counsel's request was for $ 10,000 as general damages.

Requested interest.

In addition, interest was asked at an average of 10 percent (at he District Court Registrar's rate) for the elapsed six and a half years since the Respondents were served the complaint. Damages for the above-noted claims in ## 1-3 would amount to $11,505, and interest thereon, at ten percent , to $ 1,150.50 per annum, and for six and a half years to $7,478.25.

Add thereto ten per cent of general damages requested at $10,000 per year for six and a half years, for a total of $ 6,500. The total interest would amount to $ 13,978.25 which, added to the special and general damages of $16,505, would bring all damages to $ 30,483.25.

What special damages are fair?

i. It must be assumed that under ordinary circumstances Ms. Koba would have earned her fee for the sidebar article ($ 105).

ii. The period of her engagement for two days a week at $ 100 a day is less clearly circumscribed. Commission counsel suggests that it be 32 weeks. But Respondent counsel justifiably points out that a claim for missed earnings must be supported by reasonable efforts to obtain employment.

To be sure, the initial burden of proof rests on the Respondents to show that work was available and that Complainant did not avail herself of it. That burden is satisfactorily discharged, inasmuch as Ms. Koba herself stated (T 1:149) that she moved from Edmonton to Toronto because the labour market was promising there. The burden now shifts back to her, and she must show that and how she tried to obtain work, and if she failed, that such failure was due to the injury she had sustained.

The Complainant has stated that the shock she suffered incapacitated her for some time. She slept for inordinately long hours and suffered depression. She did not, however, seek help for it, and the only palliative action she undertook was to see two physicians, with the major goal of easing her physical pain.

But such actions cannot be considered on a par with a sustained effort to mitigate her joblessness. To be sure, I cannot look into the psyche of the Complainant, and she may well have been incapacitated during the period claimed; still, I lack any proof of 32 weeks of such disability. (See *Green v. 709637 Ontario*, 9 C.H.R.R. (1988) D/4749).

I will therefore allow only eight weeks (amounting to $ 1,600) for getting herself together. It was her choice not to seek psychiatric help, and as an educated person she must have been well aware of this avenue of assistance.

Nor can I assume that a claim for $5,000 represents just compensation for other work she would have done had she not been injured. Up to October 20 she had not produced anything for the Respondents, and even though her latest curriculum vitae indicates good success in her profession (Exhibit 9), I do not know how she would have fared earlier in her career. No evidence was entered how much she was earning at the time of her injury, nor that she applied to, and was rejected by, prospective employers. Therefore I cannot entertain such a broadside claim.

Special damages are therefore judged to consist of lost pay for eight weeks at $200 per week, and for the sidebar article of $105, for a total of $1,705.

What general damages are fair?.

I agree with Commission counsel that sexual harassment is an offense that must not be taken lightly, and that in the past it has received less than adequate compensation. It must also be noted that to quantify mental anguish is not possible, and certainly comparing one injury with another is less than satisfactory. Nonetheless, an application for such damages calls for quantification, and the board must satisfied that it moves within some recognizable limits.

Seven factors guiding such judgment have been listed in *Gosh* (*supra*, at p. 50).

1. The nature of the harassment, that is, was it verbal only or physical as well?

2. The degree of aggressiveness and physical contact.

3. The ongoing nature, that is, the time period of the harassment.

4. The frequency of the harassment.

5. The age of the victim.

6. The vulnerability of the victim.

7. The psychological impact of the harassment upon the victim.

(See also *Torres v. Royalty Kitchenware Ltd. and Guercio* (1982), 3 C.H.R.R. D/858; *Cuff v. Gypsy Restaurant and Emile Abiad* (1987) 8 C.H.R.R. D/3972.)

The list is helpful, but of course it does not obviate the fact that quantifying mental anguish properly is next to impossible. Still, the Board must somehow try to assess it, and arrives at the following scale:

1. Harassment was primarily verbal, not physical, though he touched her face at the office.

2. On a scale of 1 to 10 the level of aggressiveness was 2.

3. The period during which it took place was short.

4. The harassment was spread over a brief period of time.

5. Ms. Koba was a mature woman.

6. Having been harassed twice before, she was very vulnerable. The fact that this was unknown to Mr. Dunlop is not material.

7. Ms. Koba suffered serious trauma (*vide* the call to the police) and subsequent depression.

6 and 7 are the points that are especially relevant in the instant case:

Ms. Koba appears to be a highly sensitive woman. Her demeanour on the stand showed that the mere recollection of her experience rendered her once again noticeably vulnerable. I have therefore no doubt that her trauma was intense, causing her to escape into prolonged sleep and subsequent inactivity.

Could it be said that most people don't react that way, so why penalize Mr. Dunlop for the high level of sensitivity of the Complainant? This kind of observation is a reflection of the male-dominated perception of the office environment to which women are supposed to adjust What such a view reality means is that men's instincts have automatic priority and women better conform to them.

To oppose this attitude does not mean to give assent to ordinary appreciation of women by their male partners in the work place. The *Code* is not a document devoted to prissy correctness, the violation of which becomes an infringement of the law. But Ms. Koba had no obligation to let Mr. Dunlop's suggestive remarks (however they might have been meant) "roll off her back like water" (to quote the sentiment of one witness).

A further objection to this interpretation of the *Code* might be that Mr. Dunlop could not possibly know that Ms. Koba would react in this fashion and that, had he known it, he would not have acted the way he did and in dictated he would have apologized. He was used to the rough-and-ready environment of the office, which was an adjunct to the motorcycle world and thus part of an essentially macho mind set.

But such ignorance is not important in this respect, for human rights legislation focuses primarily on the victim rather than on the intention of the aggressor. In any case, as pointed out *supra*, even a witness favourably impressed with Mr. Dunlop as her former employer, declared the kind of midnight call of which he was accused as out of bounds under any and all circumstances.

Counsel for the Commission argues for a radical escalation of awards in such instances and has asked this Board to consider the *Code's* limitation as somewhat like a starting point rather than a restriction. I have been unable

to accept that interpretation of the *Code* and award Ms. Koba the sum of $3,000 for having suffered mental anguish and damage to her dignity as a woman.

ORDER

Turbopress and Mr. Dunlop, having infringed the *Code*,, are ordered to pay Ms. Koba S 4,705 in damages.

Turbopress and Mr. Dunlop are held jointly and severally responsible for the payment of this award.

The Board reserves judgment on the matter of interest and will be in touch with the parties regarding additional submissions.

Toronto, July 19, 1993

W G Plant

BOARD OF INQUIRY

Appendix A

IN THE MATTER OF A COMPLAINT FILED BY HALIA KOBA ON NOVEMBER 26, 1986, ALLEGING DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF OF SEX AND SEXUAL DISCRIMINATION BY BRAVE BEAVER PRESS WORKS AND JOHN DUNLOP, PURSUANT TO SECTION 32 OF THE ONTARIO HUMAN RIGHTS CODE. R.S.O. 1990, c.H.19

Interim Decision

At the hearing on January 22, 1993, counsel for the respondents moved to dismiss the complaint because of inordinate delay by the Ontario Human Rights Commission, resulting in severe prejudice against the respondent parties, preventing them from mounting a complete and adequate defense.

At a teleconference on January 29, the Commission informed the parties that it had located three of the four witnesses whom the Respondents deemed vital to their defense, and further, that two of them were living in Ontario and therefore could be summonsed. The third was living in Alberta and was willing to appear in person if her expenses would be taken care of.

The Commission, having offered to make arrangements for the appearance of the witnesses, did not agree to pay expenses which, it said, was the responsibility of the Respondents.

In order to bring these severely delayed proceedings to their conclusion, the Board of Inquiry asks the Commission to assume provisional responsibility for all arrangements, including costs, so that the witnesses may be given the opportunity to appear and the complainant to have her case heard at last.

Respondent counsel asked the Board to stay the earlier motion, but reserved the right to renew it at a later time. The Board acknowledges this right.

Reasons will be presented as part of the final decision.

Toronto, February 1, 1993

BOARD OF INQUIRY
Fax 789 969-

Appendix B

IN THE MATTER OF A COMPLAINT FILED BY HALIA KOBA ON NOVEMBER 26, 1986, ALLEGING DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF OF SEX AND SEXUAL DISCRIMINATION BY BRAVE BEAVER PRESS WORKS AND JOHN DUNLOP, PURSUANT TO SECTION 32 OF THE ONTARIO HUMAN RIGHTS CODE, R.S.O. 1990, c.H.19

Request for Adjournment

Because of a death in his family the Respondent John Dunlap has requested an adjournment of the hearings scheduled for February 23 and 24,1993, in the above matter.

The request is granted.

New dates for the hearings will be set at a teleconference call, to be held on Thursday, February 25, at 1 PM.

Toronto, February 22, 1993

BOARD OF INQUIRY

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